

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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BRIEF FOR APPELLANT

Henry W. Hodges

CLERK

Court of Appeals of the District of Columbia

APRIL TERM, 1933

No. 6073

451

JAMES W. G. WALKER, APPELLANT,

vs.

**FRANCES P. THOMAS, SUSAN W. FITZGERALD,
TRUSTEES UNDER THE WILL OF JOHN G.
WALKER, DECEASED.**

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

**WILLIAM J. NEALE,
SEIFORDE M. STELLWAGEN,
ALFRED THOMAS,
J. LEONARD TOWNSEND,**
Attorneys for Appellant.

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

JAMES W. G. WALKER,
Appellant,

vs.

FRANCES P. THOMAS, SUSAN W. FITZ-
GERALD, Trustees under the Will of
John G. Walker, deceased.

No. 6073.

Statement of Facts.

This is an appeal from the decree of the Supreme Court of the District of Columbia construing the will of Admiral John G. Walker, late of the District of Columbia, deceased.

John G. Walker was an Admiral in the United States Navy and died domiciled in the District of Columbia leaving a last will and testament which was duly admitted to probate and is set out in the record (pp. 6-12). Admiral Walker left surviving him his widow and five children. After making bequests to his wife for life and certain other devises and bequests which are not necessary to a consideration of this case, he left the remainder of his property to his five children. Four of his children took absolutely and that portion set aside for the fifth child, the appellant in this case, James W. G. Walker, was left in trust under the eighth paragraph of the will to his two sisters for the benefit of said James W. G. Walker for life. Under Paragraph 2 of the will (R. p. 7), the testator explains his reason for leaving the appellant's portion in trust, as follows:

“Item 2. My desire and purpose is to treat my children equally, as nearly as possible, in the disposition of my property, but as my son

James W. G. Walker is in the naval service and will often be so situated that he cannot give proper attention to his own business affairs, I propose to place what I give, devise and bequeath to him and for his use and benefit, in trust as hereinafter set forth, excepting the bequest contained in the fifth item of this will which is not to be included in this trust."

In establishing the trust under Item 8 of the will (R. p. 9), the testator used the following language:

"One part or share is to go to my daughters Frances Pickering Thomas and Susan Walker Fitzgerald, in trust, for my son James W. G. Walker. They are to hold this share and the sum of thirty thousand (30,000) dollars to be paid to them, in trust, under the fourth item of this will, at the death of my said wife, in trust, to have and to hold the same for and during the term of the natural life of the said James W. G. Walker, paying to him from time to time for his own use and upon his separate receipt the income accruing therefrom, less the expenses of administering said trust and less such further sums as shall be required to keep the principal of said trust fund intact and to make good any losses, by depreciation or otherwise, in the investment thereof, and for this and for all other purposes of this trust to change such investment from time to time, in their discretion, without being held to liability for any loss or depreciation therein, except such as shall arise from their own several wilful default; and upon the death of the said James to divide the principal sum, as the same shall then exist, into as many equal parts or shares as there shall then be living children of said James or issue of any deceased child or children taking *per stirpes*, and the share of any such child who shall then have attained the age of twenty-five years, or of any child who shall have died during the life of the said James, leaving issue him or her surviving and living at the death of said James, to pay over to such child or issue, as the case may be, absolutely and discharged of all trusts * * *."

At the time the estate vested in the trustee on August 3, 1922, it consisted of cash and securities with a market value of One Hundred Nine Thousand Three Hundred Sixty-three Dollars Ninety-six Cents (\$109,363.96). As shown by the findings of fact of the Trial Justice, during the administration of the estate, the trustees had not sold or otherwise disposed of any of the securities at a lower price than their value when received or acquired. By reason of the careful management and investments as shown by the findings of fact (R. p. 23), the aggregate market value of the securities on December 31, 1931, was One Hundred Twenty-five Thousand Eight Hundred Eighty-four Dollars Eleven Cents (\$125,884.11). During all of this time, the trustees had regularly paid to the appellant, James W. G. Walker, the income derived from the estate. Shortly after the beginning of the depression period, the market value of the securities declined to such an extent that at the time of the filing of the bill in this case, the total market value of the securities had fallen to Sixty-two Thousand Six Hundred Eighty Dollars (\$62,680). However, as of June 12, 1933, the market value of the securities had increased to Ninety-one Thousand Two Hundred Eighty-six Dollars (\$91,286).

Owing to the decrease in market value as the result of a fluctuating market, the trustees became doubtful as to their right to continue to pay the income of the estate to the appellant because of the wording of the will creating the trust, as follows (R. p. 9):

“* * * paying to him from time to time for his own use and upon his separate receipt the income accruing therefrom, less the expenses of administering said trust and less such further sums as shall be required to keep the principal of said trust fund intact and to make good any losses, by depreciation or otherwise, in the investment thereof, * * *.”

The trustees therefore filed their bill in this cause asking the court to construe the will. In their bill of complaint, the trustees aver (R. p. 5):

“* * * Plaintiffs believe that the true intention of the testator and the correct construction of the said will is that the fluctuations in the market value of securities held in said trust are to be disregarded by the said trustees and only in the event of actual loss through sale or other disposition during the existence of the life estate is it their duty to apply the income to restore such losses and that the effect of any fluctuation in market value is to be borne by the corpus and to affect the remaindermen only, * * *.”

The trustees also allege in their bill (R. p. 5) that the appellant is without any other substantial means of support apart from the income payable to him as life tenant by the plaintiffs. The appellant, as defendant in answer to the bill (R. pp. 12-14), contends that the fluctuation of market values does not require the withholding of income and that the word “losses” must be taken to mean only such losses as are established as a result of the sale or other disposition of the securities. Also, in his answer (R. p. 14) he admits that he is without other substantial means of support apart from the income payable to him under the will. His financial condition is further set out in his Motion to Advance the Cause for Hearing (R. p. 18).

The case was heard upon Bill and Answer and Stipulation of Facts, and on June 30th, the lower court passed a final decree construing the will to mean—

“* * * any reduction in the market value of the securities held in the trust as a whole below their market value at time of acquisition of the original fund by the trustees is to be made up out of current income * * *” (R. p. 24).

The decree then goes on to make provision for payment to the appellant when, through a process of withholding income, the market value of the securities has been brought back to One Hundred Nine Thousand Three Hundred Sixty-three Dollars Ninety-six Cents (\$109,363.96), being their value at the time they were acquired by the trustee.

In addition to the appellant, his four children as remaindermen were made parties defendant and answered. By their answer, they contend that current income should be withheld in accordance with the provisions of the decree. From this decree James W. G. Walker, the present appellant, took this appeal and has filed his Assignments of Error as shown by Record, pages 25 and 26. All of these several Assignments of Error, however, we think may be discussed under one general head.

Argument.

The appellant contends that Item 8 of the will must be read in connection with Item 2, page 7 of the Record, above quoted. In Item 2, the testator clearly discloses his intention to treat all of his children equally, and undoubtedly except for the reasons given in Item 2, the appellant would have been given his part of the estate absolutely. The decree destroys the effect of Item 8 of the will for the reason that since the filing of the decree, all income has been withheld and the appellant has been deprived of his means of support which his father took such great pains to provide for him.

I. The will in question must be construed so as to give effect to the primary, general intent of the testator.

In the interpretation of wills, the intention of the testator must prevail unless it is clearly contrary to some rule of law, because wills are always equitably

and liberally interpreted, without formal restrictions or technicalities.

Young Women's Christian Home v. French,
187 U. S. 401.

Rutherford v. American Security & Trust Co.,
56 App. D. C. 214.

DeVaughn v. DeVaughn, 3 App. D. C. 50.

Bradford v. Matthews, 9 App. D. C. 438.

The whole will must be read together and searched to find the testator's intention.

Colton v. Colton, 127 U. S. 300, 8 S. Ct. 1164,
32 L. Ed. 138.

Adams v. Cowan, 177 U. S. 471, 20 S. Ct. 668,
44 L. Ed. 851.

It is also said that the intention is to be found from the whole will and not from detached paragraphs.

Washington Loan & Trust Co. v. Hammond, 51
App. D. C. 260.

There is also a well established rule that where there is a general intent apparent in the will and also a particular intent or an administrative direction, the general intent shall overrule the particular intent or direction, even though the latter appears subsequently in the will.

Eaton v. Brown, 193 U. S. 411.

St. John's Mite Association v. Buckley, 5
Mackey 406.

In the case of *Sheriff v. Brown*, 5 Mackey 172, the court quotes and adopts the statement that:

"It is a well established rule in the construction of wills that where there is a general and particular intent apparent upon the face, the general intent, although first expressed, shall control and overrule the particular."

The rule is extended even further in the case of *Finley v. King's Lessee*, 3 Pet. 377, where the Supreme Court of the United States says:

“The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected or so restrained in their application as materially to change the literal meaning of the particular sentence.”

This statement was quoted as authority in *Marion v. Williams*, 20 D. C. 20, for the method of construction in that case.

The appellant here does not contend that it is necessary to reject any words in the will here in question, nor to change their meaning. The purpose of referring to the last two cases cited is to show how well established is the rule that the primary intent of the testator shall govern, and the extent to which the courts go in applying this powerful rule of construction. The appellant's contention is that the general intention of the testator as expressly stated in this will and as gathered from the whole will explain the meaning of certain words and that the whole will can then be interpreted harmoniously giving full effect to each word.

II. *The primary, general intent of the testator was to make adequate, equal provision for his children.*

Upon considering Admiral Walker's will, it is immediately evident that it is a very common type of will. He gives his widow a life estate in practically the entire estate and then divides the balance among his children without giving preference to any one child. It is true that he puts the share of his son James in trust but this is explained in Item 2 and in that paragraph he also expressly states his primary intention.

“Item 2. My desire and purpose is to treat my children equally, as nearly as possible, in the disposition of my property, but as my son

James W. G. Walker is in the naval service and will often be so situated that he cannot give proper attention to his own business affairs. I propose to place what I give, devise and bequeath to him and for his use and benefit, in trust * * *'' (R. p. 7).

Here is an express statement by the testator of his primary general intent in making the will, expressed in that instrument. The purpose of this statement is to refute any belief that he intended to differentiate between his children and to indicate that the benefit to his children was the principal object which he had in mind. The court is absolutely bound by this statement. It cannot be disregarded and, since it is a statement of general intent, it must be given effect throughout the will and must be held to modify, explain, or control every provision in the will. No construction of the will is necessary to find the primary intent; the testator has stated it in clear language.

The only difference in the treatment of the children is in the mechanics of giving them their shares and this is explained to show that it is consistent with the general purpose. Four of the children received their shares of the residue absolutely and outright upon the death of the testator's widow. The share of the son, James W. G. Walker, is put in trust for the son's own sake because his employment would make it difficult for the son to manage and retain the share of the estate. It is not put in trust for the benefit of the persons who are to take after the son. The remainder was merely a necessary corollary to the creation of the life estate and the testator did not even have any specific persons in mind; he gave the remainder to a class the members of which would change (R. p. 9).

The greater part of the testator's gifts to his other children were absolute so that they had the entire benefit thereof. In interpreting the trust created for him, the court must remember that the testator

wished to treat him as nearly the same as the other children as was possible, having in view the inherent limitations of the trust device.

Another detail worthy of note is the testator's language in Item 2 in describing the share given his son James as "what I give, devise and bequeath *to him* and for *his use* and benefit." The testator does not describe this gift in ordinary language, which would describe the gift as what the testator gave, devised and bequeathed to named trustees for his son's benefit. Neither does the testator refer to the gift as a gift to his son and others. He only refers to the gift as what is given to his son; for the principal intention in his mind was solely the benefit of the son. Again in Item 8 in the creation of the trust for the son James the testator merely gives one share to the named trustees "in trust, for *my son* James W. G. Walker." The sentence ends without any reference to the remaindermen. While this does not create any question of the validity of the remainder, it does indicate that the testator's primary interest was the benefit created for his son. (Italics supplied.)

The intention to treat the children equally appears again in Item 3 of the will (R. p. 8) where the son James, who did not receive one of the small bequests payable at the testator's death, is given income from the residue of the estate in "an amount equal to the income my other son and daughters each receive from the thirty thousand (\$30,000) dollars to be deposited for each."

The importance of this primary general intent to treat all the testator's children, equally so far as possible, appears when the gift to the son James W. G. Walker is considered, and particularly the phrase in regard to losses of the trust.

III. *The will does not require the trustees for James W. G. Walker to withhold income on the facts as they now exist.*

The trustees, as they state in their Bill for Instructions (R. p. 2), are in doubt as to the meaning of the part of Item 8 of the will of John G. Walker in which the trust is created for James W. G. Walker, and particularly the direction that the trustees shall hold the part or share of the estate in trust during the life of James W. G. Walker "paying to him from time to time for his own use and upon his separate receipt the income accruing therefrom, less the expenses of administering said trust and less such further sums as shall be required to keep the principal of said trust fund intact and to make good any losses, by depreciation or otherwise, in the investment thereof" (R. p. 9). At present the market price of the securities held in trust is less than the market price of the securities and cash originally turned over to the trustees. To decide on a proper course of action the trustees must know the meaning of the clause quoted above.

In construing the clause the ordinary meaning of the words must be used so far as possible, but, as stated above, the court must bear in mind the primary intent of the testator which controls both the construction of the words in the will and the operation of the separate clauses. *Green v. Green*, 23 Wall. 486, 490, 23 L. Ed. 75. The question of what shall be paid to the life tenant of a trust is a question of the intent of the settlor in so far as his intent can be determined. "In this case, as in all others, the intent of a testator or grantor, when not in contravention of some rule of law, will control the court." Bogert on Trusts, p. 380.

In *Matter of Vermilye*, 100 Misc. 235, 166 N. Y. S. 320, the court said:

“From a consideration of the entire will and the disposition which the testatrix made of her estate, it is manifest that she intended to make provision for her husband’s support, and as her intention in this respect would not be carried out if the income from the balance of the estate were applied to the payment of the charges on the principal I will hold that the interest on the mortgages, taxes and other expenses incurred in connection with the unproductive real estate be charged to principal and not to income.”

Compare the *Matter of New York Life Insurance & Trust Co.*, 24 Misc. 71, 53 N. Y. S. 382, where the court said:

“We may assume, therefore, that where the life beneficiary has stood in a close, dependent and affectionate relation to the trust-maker, such as parent and child, or husband and wife, that the dominant intention in creating the trust is to provide a suitable and proper support for those to whom his affection runs, rather than the preservation or exaggeration of the capital for the benefit of the remaindermen. That as between their respective interests the life tenant should not be the one to suffer.”

With the dominant intention always controlling, the clause must be analyzed in detail to find its meaning.

A. The word “losses” means real losses actually incurred.

The dictionaries are not of much assistance in defining the word “loss”; they define it as meaning “deprivation,” and the word has been so construed in some cases.

Meadowcroft v. People, 163 Ill. 56, 81, 45 N. E. 303. The connotation of the word is: “that which can never be recovered.” 38 C. J. 244.

One of the clearest expositions of the meaning of the word “loss” used in a similar manner which we

have been able to find is in the case of *Patterson v. Vivian*, 122 N. Y. S. 347. In that case, trust funds were invested in a real estate mortgage. Default was made and the mortgage foreclosed, the property was bid in by the trustees for a sum less than the amount of the mortgage and a deficiency judgment was obtained. This judgment was worthless and the trustees held the real estate. In the instant case, it was sought to require an apportionment of the loss as between income and principal. At page 351, the court said:

“There was no basis for apportioning between principal and income a paper loss sustained upon the foreclosure of the \$55,000 mortgage or for dividing the proceeds of the sale which has not yet occurred. The foreclosure of the mortgage resulted merely in a change of form of investment. In the place of the mortgage, the trustees have real estate and a deficiency judgment. Whether there will be a loss or a gain can be *determined only when the property is sold, and it will be time enough then to make an apportionment.*” (Italics supplied.)

We have found no case in which a court of last resort has defined the word “losses” appearing in a will or trust, but the word has frequently been used by the courts in their opinions in the sense of a final loss through a sale or destruction of property held in trust. The courts do not use the word in the sense of market fluctuations.

In *Estate of Gartenlaub*, 185 Cal. 648, 198 Pac. 209, the court holds that premiums paid on bonds should be made up because there will be an eventual loss. The court then shows the meaning it puts upon “loss” by saying:

“The fluctuations in market value after purchase by the trustee are merely changes in the value of the assets of the trust estate, which are to be wholly disregarded in any accounting

between life tenant and remaindermen for funds from the trust estate invested in income-bearing property.”

In *Newman v. Newman*, 129 Misc. 784, 223 N. Y. S. 488, the court construed a will to mean that losses should be made up out of income, but in stating this decision the court describes losses as “losses which were sustained from the sale of securities”; nothing was ordered withheld on account of fluctuations in market value.

Other decisions use the word “loss” only in the sense of a loss finally realized by sale of trust assets for less than their cost.

Tuttle's Case, 49 N. J. Eq. 259, 21 Atl. 860.

New England Trust Co. v. Eaton, 140 Mass. 532, 4 N. E. 69, 54 Am. Rep. 493.

Patterson v. Vivian, 122 N. Y. S. 347.

The intention of the testator governs the meaning of individual words, but it will be assumed that words are used in their ordinary sense. *Sower v. Lillard*, 207 Ky. 283, 269 S. W. 330. The construction of the word “losses” as meaning only real losses incurred upon sale of trust securities, is consistent with the general intent expressed in the will. That is, a provision for replacing from income the actual losses incurred upon sale of trust securities, would not greatly affect the provision made for this child, but if the word “losses” is treated as meaning paper losses on market fluctuations, there would be an immediate conflict with the general intention to make an adequate and safe provision for the son, because then any variation in market values would affect the gift to the son. If the construction of the court below be correct in such cases as we are now dealing with, no trustee would be safe in dealing with the beneficiary except by settlement upon daily balances, which would certainly be unreasonable if not absurd.

While tax matters are often distinguishable from

other cases, it is worth noting that the various Federal Income Tax Laws allow deductions only for losses which have actually and finally been incurred. This is an expression of the general understanding of the meaning of losses.

Where a person uses a word in an instrument creating a trust, it may generally be assumed that it is used in a sense consistent with the commonly accepted conception of the nature of trusts. It is therefore helpful to consider the essential conception of a trust in order to decide which of two meanings shall be applied to certain specific words. If one meaning is consistent with the doctrine of trusts known to the law and the other meaning is inconsistent, then the former meaning is more probably the one which was intended by the creator of the trust and the one which should be adopted by the court in the absence of strong evidence to the contrary.

There are two broad conceptions of trusts, they may be treated as a fund of a certain value—the “quantum” theory, or as a thing held by a trustee—the “res” theory. See Isaacs, *Principal—Quantum or Res?* 46 Harv. L. Rev. 776. Under the former theory the trust is conceived as being a fund with a capital made up of a fixed amount or fungible units. The latter theory conceives of the corpus as a particular *res*, which is unimpaired so long as the *res* is still in possession, regardless of its money value. Under this theory the principal may increase or decrease in market value without incurring a gain or loss. The *res* theory originally arose in trusts and is particularly adapted to trusts of real estate, which were the common type of trusts in the early history of trust law. Clearly there could be no loss in case of a trust of land so long as the trustee continues to hold the land, even though the money value of the land has greatly decreased. Another reason some-

times given is that if the decrease in market value of trust assets were a loss, then any increase in market value would be income payable to the life tenant. *New England Trust Co. v. Eaton, supra.*

All courts apply the *res* theory to some extent and the courts which follow the rule that stock dividends go to capital are firmly entrenched behind the *res* theory, for the basis of that rule is that the interest in the corporation is the corpus of the trust fund and it makes no difference whether that interest is split up into more certificates with new value to the new shares, the corpus is the same, namely, the proportionate interest in the corporation. The *res* doctrine has been expressly recognized in a few cases.

Hayes v. St. Louis Union Trust Co., 317 Mo. 1028, 1043, 2985 W. 91, 97.

New England Trust Co. v. Eaton, supra.

The courts of the District of Columbia and of the United States have adopted the rule that stock dividends belong to the corpus of the trust.

Gibbon v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. ed. 525.

Lanston v. Lanston, 53 App. D. C. 340.

They have thus adopted the *res* theory of trusts and the usual situation is that the trust will not be considered to have incurred a loss merely because the value of stocks held by the trustees has decreased in value. The stock which is the corpus is still held by the trustees. There can be no loss while they hold. The case would be clear if the corpus were land.

If the testator's intention is not perfectly definite the court should construe it as consistently as possible with the usual trust rules. Therefore, in this instance the word "losses" should be interpreted in a sense which is in harmony with the usual doctrines of trusts at the domicile of the testator. This requires a ruling

that "losses" means actual losses through sale or total destruction of a part of the corpus.

The ordinary method of trust accounting is for the trustee to charge himself with the inventory or cost value of the securities held by him and only to credit losses on sales. Thus on the usual basis of trust accounting "losses" would mean only losses on actual sales.

Estate of Gartenlaub, supra.

Cf. *Lannin v. Buckley*, 256 Mass. 78, 83.

The check on trustees is not to require them to be responsible for decreases in market value, but exists in the requirement that the trustees must sell the trust assets if they have clearly lost their value or security.

See *Johns v. Herbert*, 2 App. D. C. 485.

B. The words "by depreciation or otherwise" do not modify the word "losses," but confirm the construction of "losses" as meaning actual losses through sales.

The will provides for making good "losses, by depreciation or otherwise" (R. p. 9). The reference to depreciation or other cause is demonstrative and not qualifying. The comma after the words "losses" indicates that this is the fact, for if the testator wished to provide for a qualified type of losses such as losses by depreciation, he would not have placed the comma after "losses." The inclusion of depreciation demonstrates only one kind of loss which might occur. This being the case, the word "losses" is the primary word and it should be construed alone unless the succeeding words clearly conflict with the normal meaning of "losses." Setting off the reference to depreciation in commas and in conjunction with the word "otherwise," indicates that it is not depreciation which is to

be provided for, but losses which might subsequently be incurred as a result of depreciation or other cause.

Since the will shows a distinction between losses and depreciation the phrase should be interpreted as though it said—losses of any sort, including losses which may result from depreciation or other cause. Then the word “losses” must stand and be construed alone according to the rules argued above. Since an actual loss on sale may result from depreciation, there is no conflict between the two words. *Patterson v. Vivian, supra.*

C. *The direction to keep the trust fund “intact” is consistent with the above definition of “losses.”*

The word “intact” means untouched or left entire. Webster’s Dictionary. This phrase is consistent with the above interpretation of “losses” because under the *res* theory, the trust fund is intact and entire so long as the trustee holds the securities in which it is invested. The phrase is most consistent with a direction to the trustees not to permit waste. The phrase does not support the court’s decree, because the trust fund is intact, entire, and untouched regardless of its value. Again there could be no question if this were a trust of land.

IV. *The necessitous condition of the life tenant justifies and requires the payment of income to him.*

The life tenant is without any other substantial means of support apart from the income payable to him as life tenant under this trust, as alleged in the trustee’s Bill of Complaint (R. p. 5). This allegation was admitted by the life tenant (R. p. 14), and was not denied by the remaindermen (R. p. 16). There is also an affidavit by the life tenant which is part of the record (p. 18) which states that he was entirely dependent upon the income of this trust for his sup-

port in 1933, and the court may assume that this will be the fact for years to come in view of the destruction of orchard property in Maine by the severe winter, of which the court may take judicial notice.

Where conditions arise which could not have reasonably been foreseen by the creator of the trust, the trustees may even be authorized to disregard the terms of the trust if necessary to relieve the necessity of the beneficiary. It is said in 2 Perry—Trusts and Trustees 906 (Sec. 539) “the court may authorize the trustee to encroach upon the principal for the support of the cestuis if unforeseen circumstances have swept away so much of the principal that the income is insufficient for the purpose, even if there is an express provision that no part of the principal should be paid to them.” See *Brown v. Berry*, 71 N. H. 241, 52 Atl. 870.

The necessity of the beneficiary has often been made the sole reason for overruling the directions in a trust instrument. Thus in *Curtis v. Brown*, 29 Ill. 201, 230, the court said:

“Can it be said that the beneficiary of an estate which would bring in the market \$100,000 should perish in the street for want, or be sent to the poorhouse for support, or that the estate should be totally lost, because there is no power in the courts to relieve against the provisions of the instrument creating this trust?”

And in *Pennington v. Metropolitan Museum*, 65 N. J. Eq. 11, 22; 55 Atl. 472, there is a statement that:

“If trustees disclose a situation of their trust in which a slavish adherence to the terms of the trust will operate to wholly prevent the benefits intended by its creator, and may seek instructions and directions as to their duty, I think that instructions and directions for a course of conduct which, though differing from that prescribed by the terms of the trust, will actually carry out the intent of the creator, may well be grounded upon and sustained by the necessity of the case.”

See also

Brown v. Berry, 71 N. H. 241, 52 Atl. 870.

Russell v. Russell, 109 Conn. 187, 145 Atl. 648.

Bennett v. Nashville Trust Co., 127 Tenn. 126,
153 S. W. 840.

Cf. Montgomery v. Brown, 25 App. D. C. 490.

There is no necessity for applying this extreme rule here, but the doctrine which supports the rule should also assist in the interpretation of ambiguous clauses. The necessity of the life tenant is a substantial matter to be considered in interpreting the clause.

Conclusion.

It is quite apparent from reading the whole will that the primary intent of the testator was to provide an income for his son for life. It is true that incidentally he established a remainder for the children of the appellant. We submit, however, that it was not his primary intention to build up a remainder for the benefit of the appellant's children to the exclusion of the right of appellant to receive the income which he had so carefully provided for. The effect of the decree of the court below, however, is to do this very thing. The appellant is now and has been without means of support since the date of the decree for the sole reason that the lower court has in effect held that the primary object of the testator was to build up an estate for the benefit of the appellant's children.

The appellant therefore respectfully submits that the decree of the lower court should be reversed, with directions to enter a decree in accordance with the prayers of his answer, and that the trustees be directed forthwith to pay over to this appellant so much

of the income as has been withheld pending this litigation.

Respectfully submitted,

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FILED NOV 1 - 1934

~~Henry H. Adams~~

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1933.

No. 6073.

JAMES W. G. WALKER, *Appellant*,

vs.

FRANCES P. THOMAS, SUSAN W. FITZGERALD, TRUSTEES
UNDER THE WILL OF JOHN G. WALKER, DECEASED,
ET AL., *Appellees*.

**BRIEF IN BEHALF OF APPELLEES, JOHN GRA-
HAME WALKER, SERRELL W. WALKER,
HERBERT WALKER, AND ELIZABETH
WALKER DAVIS.**

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1933.

No. 6073.

JAMES W. G. WALKER, *Appellant*,

vs.

FRANCES P. THOMAS, SUSAN W. FITZGERALD, TRUSTEES
UNDER THE WILL OF JOHN G. WALKER, DECEASED,
ET AL., *Appellees*.

**BRIEF IN BEHALF OF APPELLEES, JOHN GRA-
HAME WALKER, SERRELL W. WALKER,
HERBERT WALKER, AND ELIZABETH
WALKER DAVIS.**

STATEMENT OF THE CASE.

The late John G. Walker, a retired Rear Admiral in the United States Navy, left a last will and testament in which, among other things, he left a fund in trust for the life of his son, the appellant, James W. G.

Walker, also then an officer in the United States Navy, with remainder, upon the death of that son, to his children or their respective issue. The appellees, John Grahame Walker, Serrell W. Walker, Herbert Walker and Elizabeth Walker Davis are the four and only children of this life tenant. During the life of this son, James W. G. Walker, the trustees of the fund, sisters of the testator and also appellees herein, were directed by the will to pay to the son, "from time to time for his own use and upon his separate receipt the income accruing therefrom, less the expenses of administering said trust and *less such further sums as shall be required to keep the principal of said trust fund intact and to make good any losses, by depreciation or otherwise, in the investment thereof.*" etc. (italics ours). (R. p. 9) The expression in italics just quoted is the one which the Court below was called upon to construe.

At the inception of this trust, on August 3, 1922, the trust fund consisted of cash and securities which then had an aggregate market value of \$109,363.96. Through appreciation, sale and reinvestment the fund, at the time the bill was filed, had cost a total of \$125,687.10, and, on December 31, 1931, a few months before the filing of the bill, the aggregate market value of the securities comprising the fund was \$125,884.11. At the time the bill was filed, on May 11, 1932, the total market value of these securities was \$62,680, but on June 12, 1933, this total market value had increased to \$91,286. The trustees, however, have not sold or otherwise disposed of any of the securities at any time belonging to the fund at a lower price than their value when received or acquired. The income from the trust fund during the calendar year 1931 was approximately \$7920, and in spite of the decline in the market value

of the fund from \$125,884.11 on December 31st of that year to \$62,680 on May 11th of the following year, the income of the fund for the year 1932 was approximately \$6450. (R. p. 23.)

As of June 12, 1933, when the securities comprising the trust fund had a total market value of \$91,286, \$76,046 of this amount was in common stocks consisting of American Telephone and Telegraph Company, Southern Pacific Railroad Company, Union Pacific Railway Company, and American Sugar Refining Company, while \$15,240 in value was in railroad bonds, partly those of the Chicago, Rock Island and Pacific Railroad Company and the remainder in bonds of the St. Louis Iron Mountain and Southern Railroad Company which latter bonds had been late in paying their interest due May 1, 1933, and were in default as to the principal, with the probable necessity of going through a reorganization (R. pp. 20-21). These securities were, of course, not of the character suitable for trustees, except under provisions giving the trustees latitude in investments, such as found under the will here involved, and the high income return which the life tenant had been enjoying was obtained through investments of this speculative character.

The lower Court, in construing the above quoted and italicized sections of the will, decreed that, by proper construction of this language, "any reduction in the market value of the securities held in the trust as a whole below their market value at time of acquisition of the original fund by the trustees is to be made up out of current income" and that payment of income to the life tenant, the appellant, was only to be made when said trust fund had been restored to its original value, or in other words when said trust fund was in fact "intact". (R. p. 24.)

From this construction of the will, the life tenant has appealed, basing his appeal, in effect, upon the claim that other general provisions of the will render this clear and unambiguous clause uncertain.

Counsel for the appellant, on page 1 of their brief, in referring to the provisions made by the testator for his five children, say, "Four of his children took absolutely," etc.

This statement is not accurate, particularly in its implications. Under their father's will the five children took as follows:

1. Susan Walker Fitzgerald, about \$80,000 outright and a trust of \$30,000.
2. Frances Pickering Thomas—the same.
3. Henry Pickering Walker, about \$60,000 outright and a trust of \$50,000.
4. Sarah Cochran Walker, as next preceding.
5. James W. G. Walker—nothing outright—all, \$109,000 plus in trust.

These facts throw much light on the gesture in Item 2 of the will:

"Item 2. My desire and purpose is to treat my children equally as nearly as possible, in the disposition of my property, but as my son James W. G. Walker is in the naval service and will often be so situated that he cannot give proper attention to his own business affairs, I propose to place what I give, devise and bequeath to him and for his use and benefit, in trust as hereinafter set forth, excepting the bequest contained in the fifth item of this will which is not to be included in this trust."

The fifth item relates to portraits, watch and chain.

It should be noted that, although the testator, at the

time he made the will, was a Rear Admiral in the United States Navy, he had, apparently, found himself perfectly competent to handle successfully an estate of several hundred thousand dollars, so that Item 2, if one reads between the lines, may fairly be construed as a kindly effort of a father to save from embarrassment a son whose estate he felt should be held in trust as long as this son lived.

This seems the more apparent when one considers that, of the other children, two of the daughters, Susan Walker Fitzgerald and Frances Pickering Thomas, each received outright approximately \$80,000, and Henry Pickering Walker and Sarah Cochran Walker approximately \$60,000 each outright, while appellant's entire interest is placed in trust.

The testator's relative interest in his son, the appellant, and in his grandchildren, the four appellees in whose behalf this brief is filed, most clearly appears from the very expression which the lower Court and now this Court have been asked to construe. That phrase shows a clear desire and intent on the part of the testator, as well as a direction, designed to carry on to the grandchildren, these appellees, the corpus of this trust intact, not in point of the same securities, but in point of the aggregate market value of the trust fund as a whole. The phrase shows a willingness and intent of the testator that his son should even be deprived of any income from the fund if that should be necessary to preserve the value of the corpus for the benefit of his children.

It should be noted that the trustees are not neutral in this matter, but, in the very bill in which they have set forth what they conceive to be the question with which they are confronted and have asked the Court

to instruct them in regard thereto, they side with the life tenant by giving their views or those of their counsel that depreciation in the market value of securities held in the trust is to be disregarded and that it is only in the event of actual loss through sale or other disposition during the existence of the life estate that it is their duty to apply income to restore such losses (R. p. 5).

ARGUMENT.

The clause of the will here involved is the one in which the testator, after establishing a trust fund to be held during the life of his son, the appellant, James W. G. Walker, directed that the income therefrom should be paid to the son less the expenses of administering said trust and "*less such further sums as shall be required to keep the principal of said trust fund intact and to make good any losses, by depreciation or otherwise, in the investment thereof,*" etc. (italics ours). Appellant seeks to escape the plain provisions of this clause by arguing that other provisions of the will disclose a general intent inconsistent therewith, and then rewriting this clause so as to express what the appellant conceives to have been an intent of the testator different from that therein expressed.

I. There is Nothing in the Other Parts of the Will Which Overrides the Provisions of this Clause in Item 8 Herein in Question.

Appellant's entire case rests in a contention that Item 2 of the will in which the testator expressed a desire and purpose to treat his children equally, as nearly as possible, is to control the express provisions made

for each child. This contention, if upheld, would result in a rewriting of the entire will. Not even the other four children were treated identically. Two of them received approximately \$20,000 more outright than the other two, and the appellant is the only one of the five whose bequest was all placed in trust. (R. pp. 8-9.)

The will, when read as a whole, and these appellees join in the contention that it must be so read, shows that the testator considered that he had carried out the general purpose expressed in Item 2 when he had allocated to each child and his or her issue taken collectively approximately the same amount in money or securities.

When the testator says that he intends to "treat my children equally, as nearly as possible, in the disposition of my property", he does not necessarily mean, in fact the will shows that he did not mean, that each child was to receive for itself individually the same amount as each of the other children. In other words, the testator thought of his children, not individually, but "*per stirpes*" so to speak, and felt that, when a child and its issue together received the same aggregate benefit as another child, he had treated his children alike. If this was not the testator's thought, then, in view of the specific provisions of the will which are not questioned, Item 2, which declared this general intent, was only an idle gesture, except in so far as it may have been placed in the will in order to relieve, if possible, the embarrassment that the appellant might otherwise have felt at having his entire share put in trust.

Even if, contrary to our view, it be thought that the specific provision for each child is inconsistent

with the general purpose expressed in Item 2, the specific provision must control.

In Rood on Wills (2d ed.) Sec. 422, it is said:

“Suppose a testator to declare his purpose in making his will to be to make his children equal financially, and therefore he divides his property between them in a certain proportion. The court cannot divide it in any other way to accomplish his purpose if his division does not do so.” Citing *Terry v. Smith*, 42 N. J. Eq. 504, 510, which supports the text.

It is submitted that there is nothing in this will or in the facts before the court which lend any support to a contention that the testator did not mean what he said in directing that the principal of the trust fund here in controversy should be kept “intact”.

A rather complete answer to some of the contentions made by the appellant in this respect is given in one of the cases cited in appellant’s brief, namely, *Hayes v. St. Louis Union Trust Co.*, 317 Mo. 1028, 298 S. W. 91, in which the Court said (298 S. W. 95):

“A point is made also, on the circumstances, that the life beneficiaries of the trust are the testator’s children whereas the remaindermen are only grandchildren and perhaps lineal descendants unborn. It is suggested that the testator had presumably greater affection for the former and from that an inference is drawn that he intended them to receive stock dividends. We are not impressed with this argument, either in the light of the provisions of the will, the extrinsic evidence showing the relations between the parties, or of human nature itself. On the contrary, the fact that the will exacted repayment of advances from the children and their descendants out of income, but exempted

the final beneficiaries from such payments out of the corpus, the fact that the trust is a spendthrift trust and the fact that the testator, a month before his death, by codicil threatened with disinheritance any beneficiary who resisted the will, a provision obviously aimed at the children rather than his grandchildren—all these considerations point rather to the conclusion that the testator desired the corpus of his estate to be held inviolate and intact. The proof that the children were improvident does not weaken this conclusion.”

II. The Clause of Item 8 of the Will Here Involved is Clear and Free from Ambiguity.

A trust fund invested in securities is not kept “intact” by a mere retention of the same securities. After all, those securities are merely evidence of the rights of the trustees in the respective corporations which issue the same. Where securities, such as those comprising this trust fund, are listed and regularly sold on established exchanges, their market value is easily determinable from day to day. It is hard to conceive of a broader expression, by way of explanation of what is meant by the word “losses”, than the expression, “by depreciation or otherwise.” In other words, losses of any kind whatsoever are included, whether the securities have declined in value, have been exchanged for other securities of a lesser or subsequently declined value, or have been sold. If “losses” can be established only by sale, as appellant contends, then the addition by the testator of the words “by depreciation” was futile and meaningless.

The use of the word “depreciation” negatives any idea that a sale was necessary in order to establish it.

In *New York Life Ins. Co. v. Anderson*, 263 Fed. 527

(C. C. A. 2, 1920) the court, in holding that under the Corporation Tax Act of 1909 a corporation was entitled to a deduction of the amount of the market depreciation of the securities held by it, said (p. 529):

“We have no doubt that this loss in market value is depreciation. The word means, by derivation and common usage, a ‘fall in value; reduction of worth’; and it seems to us to require mention only to prove that the average citizen, for whom statutes are assumed to be made, would judge depreciation of his own bonds by the opinion of the public, however thoroughly convinced of the ultimate wisdom of holding onto what had depreciated.”

The clause here involved, in short, is so clear and unambiguous that it really requires no construction. The filing of this bill evidently originates from a claim of the life tenant to more than the clear intent of the will entitles him or to a desire on the part of the trustees to favor him at the expense of the remaindermen, appellees herein. This becomes the more apparent from the fact that the trustees, who owe an equal obligation of impartiality to life tenant and remaindermen have, in their paragraph 5 of the bill of complaint herein, taken it upon themselves to express their belief that the proper construction of this will is that there is no loss which should require a withholding of income from the life tenant except a loss realized through sale or other disposition of securities during the life estate (R. 5).

If that construction be sound then it necessarily follows that any “loss” established by a sale would have to be made good by the withholding of income regardless of the total value of the trust estate. This

would mean that even though the total value of the trust fund were greatly in excess of its original value, if a security were sold at less than cost or original value, the life tenant's income would be withheld till this loss had been made good. If the trustees had chosen to sell the depreciated securities instead of retaining them, it is quite inconceivable that the life tenant and trustees would have taken the position they now urge.

III. The Necessitous Condition of the Life Tenant is Immaterial and Furthermore Has Not Been Proven.

It is to be noted that there is no provision in the will now before this court which in any wise refers to the condition or need of the life tenant, much less makes any such condition or need the basis of any action by the trustees.

Appellant's reliance, on pp. 18-19 of his brief, on 2 Perry on Trusts and Trustees, 906 (Sec. 539), has no real application, therefore, to the case at bar, nor has the case of *Brown v. Berry*, 71 N. H. 241, also relied upon by Perry and appellant, for in that case the testator had expressly directed that ample support be furnished the beneficiaries. That is entirely different from any provision in the present will.

It should be kept in mind, that, while a court of equity may deviate from the directions of a trust in order to save an estate from loss, it may not do so to favor one beneficiary against another, unless sanction for such favoritism be found expressly or by clear implication in the terms of the trust.

Furthermore, the needs of the life tenant have not

been established in this cause. It is true that the trustees, plaintiffs below, so alleged in their bill, and that the appellant, life tenant, so admitted. But that cannot bind these appellees, who, in their answer (R. p. 16), said they had no sufficient knowledge or information to enable them to admit or deny these averments, thus, under our rules of pleading, in effect, denying the same and putting appellant upon proof. This proof was not forthcoming, and accordingly, insofar as these appellees are concerned, appellant stands here without having established any need on his part, immaterial as such proof would be in any event.

CONCLUSION.

Common sense rather than authorities, none of which found by either side are particularly helpful, is the real and fitting guide in construing language in a will which really needed and required no construction, but for the desires of a life tenant and the sympathy of his sisters, the trustees.

We respectfully submit that the decree of the lower Court was correct and should be affirmed.

Respectfully submitted,

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